Service Date: December 29, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF GREAT FALLS GAS	)	UTILITY DIVISION
COMPANY, Application for Approval of a Plan	)	
to Offer Open Access and Customer Choice	)	DOCKET NO. D98.3.68
for Natural Gas Supply (Restructuring)	)	ORDER NO. 6064b

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

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FOR THE PROTESTANTS:

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FOR THE COMMISSION:

Martin Jacobson, Staff Attorney, Wendy Fuller, Rate Analyst, and Dave Burchett, Rate Analyst, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620

BEFORE:

BOB ANDERSON, Commissioner and Presiding Officer
DANNY OBERG, Commissioner
BOB ROWE, Commissioner

INTRODUCTION

1. On March 24, 1998, Great Falls Gas Company (GFG) filed before the Public Service Commission (PSC) an application to offer open access and customer choice on GFG's natural gas system. GFG's application is made pursuant to Montana's Natural Gas Utility Restructuring and Customer Choice Act, §§ 69-3-1401 through 69-3-1409, MCA, which allows natural gas utilities to voluntarily restructure (i.e., offer open access and customer choice).

2. The PSC publicly noticed GFG's application on April 8, 1998, through a Notice of Application and Intervention Deadline. Petitions for intervention were filed by the Montana Consumer Counsel (MCC), Montana Power Trading and Marketing Company (MPTM), and Commercial Energy of Montana, Inc. (CE). The intervenors actively participated throughout proceedings on the matter.

3. Prehearing procedures included discovery on GFG's application and initial prefiled testimony, intervenor prefiled testimony and discovery on that, and GFG rebuttal testimony. A public hearing was held September 16, 1998, in Great Falls, Montana. Posthearing arguments (i.e., briefs) have been submitted.

FINDINGS OF FACT AND DISCUSSION

GENERAL

4. GFG is a public utility providing natural gas service to customers in and near Great Falls, Montana. GFG's 1997 annual report to the PSC shows GFG serves approximately 22,500 residential customers, 2,500 commercial customers, and 2 industrial customers. As a public utility GFG is a monopoly provider of natural gas utility services to customers within its service area. The major components of natural gas utility service include supply (e.g., production), storage, transmission, and distribution. GFG does not own natural gas production, gathering, storage, or transmission facilities, but has contracted for these components of natural gas service from other providers. The PSC regulates GFG, including in regard to quality of service provided and rates charged for the services provided.

5. GFG has not previously filed for restructuring. However, GFG already provides some utility service on an open access and customer choice basis through tariff provisions

approved in PSC Docket No. D96.7.123, Orders No. 5933a (November 6, 1996, interim order) and 5933b (April 8, 1997, final order). Certain qualifying GFG medium general service and larger customers who have secured supply and transportation to a point of interconnection with GFG's distribution system may take service under GFG's distribution transportation (DT) tariff. GFG has also provided its largest customers (e.g., Malmstrom AFB) choice-of-supply opportunities for the past decade.

6. GFG states that its application for restructuring has several purposes, including: to develop terms and conditions through which existing open access and customer choice to GFG's customers will be provided (e.g., GFG's DT service); to establish a code of conduct to govern GFG's relationship with its marketing affiliate, Energy West Resources (EWR); and to develop terms and conditions through which open access will be made available to GFG's remaining customers (i.e., small general service customers and residential customers). GFG proposes a transition period (not more than five years) to full customer choice for all GFG customer classes. GFG also proposes a traditional service (TS) tariff for customers not wanting to change suppliers. In testimony accompanying GFG's application, GFG identifies several additional purposes of the filing, including: to present a rate design stipulation between GFG and MCC, which GFG claims more accurately reflects GFG's fixed costs of service; to present modifications to GFG's uniform system benefits program; and to present a Rule 18 tariff to allow GFG to provide certain services at customer request.

7. If GFG's application is approved by the PSC, GFG will remain in control of its distribution facilities for distribution of natural gas to consumers and will be a "distribution services provider." § 69-3-1402(3), MCA. The PSC will continue to regulate GFG in regard to GFG distribution services. If GFG's application is approved, by the end of GFG's proposed transition period all of GFG customers will have choice of natural gas suppliers who compete on GFG's system. The PSC will continue to regulate GFG regarding certain aspects of any supply-related functions retained by GFG (e.g., review of prudence of natural gas purchases made by GFG for customers who remain on the traditional service tariff). See, § 69-3-1404(3), MCA.

8. To the extent a utility offers open access and customer choice, a marketing affiliate of the restructured utility may compete to provide supply in other restructured utility service areas. A reciprocity provision within the Act prohibits a utility's marketing affiliate from

competing in other utility service areas, unless the affiliate utility offers customer choice and open access in its own service area. § 69-3-1406, MCA. If GFG's restructuring proposal is approved, GFG's marketing affiliate (i.e., EWR) can compete to supply consumers in other utility service areas that are open access and customer choice.

9. To date the only other Montana natural gas utility to restructure under the Act is Montana Power Company (MPC). MPC's natural gas utility restructuring was considered by the PSC in PSC Docket No. D96.2.22 and approved through PSC Order No. 5898d (October 31, 1997). MPC's restructuring is in the transition stage, with choice for all customers expected on or before July, 2002. Intervenor MPTM is MPC's marketing affiliate.

GFG AND INTERVENOR TESTIMONY

GFG Application and Initial Testimony

10. GFG presented testimony through two witnesses, Sheila Rice and Tim Culliton. Through these witnesses GFG describes GFG’s restructuring proposal. GFG anticipates customer choice for all customers by the fall of 1999, with a provision for traditional service for customers who wish to retain traditional utility service. As of October 1999, GFG intends to no longer be a gas merchant, except for bundling supply and transportation service for traditional service customers. GFG proposes new distribution tariffs (DT), traditional service tariffs (TS), and gas and transmission costs tracking mechanisms. GFG also outlines a five-year gas supply contract with EWR to supply the GFG traditional service load. GFG describes a terms and conditions tariff which includes codes of conduct both for GFG and suppliers using the GFG’s system and a consumer bill of rights.

11. GFG discusses the proposed new DT tariff and explains that the rates include distribution system costs, transportation capacity costs upstream of the city gas meter, storage costs related to monthly balancing for cycle billing and weather normalization, and the costs associated with GFG being the provider of last resort. The new DT tariff rates exclude all other storage costs associated with gas supply that are currently included in the transportation tariffs. It is important to note that the term “storage costs” can be confusing because storage is used for more than one function. First, some storage is needed for system integrity, cycle billing, and weather normalization. Secondly, storage can be used by a utility for gas purchase arbitrage.

The utility buys gas in the summer months when gas is cheapest, and stores it for use during the expensive winter months. Although storage has always been used for multiple functions, it is important in this docket to distinguish the different types of storage.

12. GFG's proposal also includes a gas-costs tracking mechanism for both the DT and TS tariffs. GFG proposes an implementation schedule where DT rates go into effect on September 1, 1998, for medium general service and larger customers and on September 1, 1999, for the small general service and residential classes.

13. GFG explains that the proposed TS tariff allows current customers to choose a service that is essentially the same service as GFG has provided in the past. In the tariff gas purchase costs will be combined with DT rates to create a bundled service. GFG and EWR have signed a five-year contract for the provisioning of gas supply for these customers.

14. The GFG / EWR gas supply contract has been in effect since November 1, 1997. The contract assigns all gas supply contracts held by GFG to EWR and further assigns management of GFG’s storage on MPC’s system to EWR. In exchange, EWR agrees to provide management of commodity, storage, daily systems nominations and balancing, and provider of last resort supply to GFG. GFG agrees to pay a set gas price of $1.59 for the first two years of the contract, with the price for the remaining three years of the contract to be negotiated. The contracted gas price will be reviewed in the GFG's tracker docket (PSC docket No. D98.9.213).

15. After the five-year period, GFG plans to competitively bid its gas supply requirements for traditional service customers. GFG identifies several reasons why GFG contracted with EWR to provide services to the utility rather than request bids for these services at this time. First, assignment of the long-term gas supply contracts helps GFG move out of the merchant function. Second, an expensive and time consuming bidding process is avoided. Third, EWR is familiar with the GFG system and GFG retains an element of control over EWR services.

16. GFG explains that all customers currently eligible for choice will continue to be eligible under the new tariffs. During the first phase of customer choice, large customers were required to declare their intentions to use a supplier or remain a full service customer by August 1, 1998, in order to assure adequate resources to supply demand.

17. GFG explains that the second phase of GFG's customer choice plan will involve an extensive customer education campaign in the summer of 1999, including a ballot requesting customers choose a supplier or traditional service. GFG proposes that customers who do not choose either to contract with a supplier and pay the DT rate or to remain a traditional service customer will remain a traditional service customer until the beginning of the third year of full customer choice, at which time those customers would be assigned to suppliers on a market share basis. According to GFG, this will give suppliers an incentive to enter the GFG service area market as quickly as possible.

18. GFG also presents a terms and conditions tariff outlining a utility code of conduct and a supplier code of conduct intended to ensure that the utility treats suppliers fairly and that suppliers treat customers fairly. Part of the supplier code of conduct prohibits outbound telephone solicitation, a provision added by GFG due to customer concerns that suppliers might engage in telephone solicitation after customer choice is implemented. GFG explains that its customers are further protected through requirements that bills must be clear and easily read, that toll free numbers where the supplier may be reached be included, and that suppliers must establish a consumer complaint process. As a safeguard, only GFG can institute shut off procedures if problems arise.

19. GFG also included a stipulated rate design negotiated with MCC in this filing. The stipulated rate design eliminates seasonality, changes customer charges, reduces the cost difference between variable rate blocks, and consolidates GFG's medium general service (MGS) class and the large general service (LGS) class. The rate design changes increase the monthly customer charge and makes an equivalent decrease in variable rates. With the exception of changes caused by the combining of the MGS and LGS classes, the rate design does not cause a change in total revenue requirement, or in revenue requirement distribution between classes.

20. GFG is proposing to combine these classes because customer classification is determined by the size of meter used and new commercial class customers who fall close to the upper volume limit of the MGS class to try to minimize energy costs by installing the smaller meter (MGS size). Although this size may be appropriate for the customer’s current load requirement, the meter is undersized for any additional load that may be needed. The undersized meter can result in a loss of gas pressure to the equipment. In addition to this meter-sizing

problem, GFG explains that having four different commercial classes is administratively problematic.

21. GFG has proposed a new operating rule, Rule 18, which would allow GFG to perform certain customer-requested services related to GFG's providing of natural gas services. GFG suggests that Rule 18 is natural extension of services a utility can provide and will provide benefits to consumers who might realize cost savings over maintaining customer-owned systems themselves. GFG proposes that consumers be charged cost-based rates for these services. It appears that GFG intends to service customer-owned distribution facilities (e.g., master-meter systems) including providing periodic testing, leak detection, cathodic protection, and other maintenance for customers through Rule 18.

Commercial Energy Testimony

22. Intervenor Commercial Energy (CE) presented testimony through Ron Perry. CE criticizes the contract between GFG and EWR as giving EWR an unfair marketing advantage. CE asserts that GFG's assignment of storage to EWR gives EWR storage-related price advantages in competitive situations. CE suggests that storage volumes owned by GFG can be used by EWR to supply EWR customers and GFG customers would be paying for storage used by noncore customers. CE notes that the contract between GFG and EWR does not track the storage volumes and therefore there is no assurance that EWR is not using this storage to its advantage. CE also testifies that of the 125 customers GFG claims have exercised choice, all but one have chosen EWR, and CE offers this as proof that EWR has an unfair advantage.

23. CE points out that "open access" means a utility's transmission, storage, or distribution facilities available to all suppliers, providers, and customers on a nondiscriminatory and comparable basis. § 69-3-1402(6), MCA. CE complains that the benefits gained by EWR through its contract with GFG were not offered to any competitor.

24. CE also argues that GFG's restructuring plan is a sham and violates the letter and spirit of the Act. CE argues GFG has done everything possible to provide benefits to GFG's marketing affiliate EWR while excluding competitors from the service territory.

25. CE testifies that competition is inhibited by the GFG / EWR contracted gas price. CE also believes that the nature of the GFG / EWR contract restricts competition because it does not post a firm future price by August 15 of each year, the date necessary for suppliers and

customers to reference before the new heating season starts. CE argues that GFG should post a firm price for supply to each class of customer. CE argues GFG should be denied recovery if the actual price exceeds the posted price by more than 0.05 percent, to ensure best efforts in pricing and no disadvantage to competitive alternatives.

26. CE testifies that the volume normalization to 1996 levels provided in the contract understates actual volumes. CE objects to the proposed restriction on telemarketing. CE also suggests that GFG be required to implement demand metering, as the lack of demand-based rates in GFG's service area deters competition because commercial businesses are subsidizing residential customers. CE also suggests that GFG implement an interruptible tariff for all business customers.

27. CE initially recommended that the PSC void current GFG service territory customer contracts with EWR and assigning them to competing suppliers to reverse the advantages gained through unfair practices. CE later seemed to acknowledge that many of the advantages gained by EWR during the past year are irreversible in any event, because contracts have already been signed and relationships have been developed. CE now recommends that the PSC temporarily revoke EWR’s license to sell natural gas in the Great Falls area until some, undetermined level of competition is reached. CE maintains that this will open benefits to other suppliers in the region and negate some of the advantage gained by EWR.

28. In order to further competition in GFG's service area, CE recommends opening up the contract to bidding, requiring that demand meters be installed on large commercial accounts, establishing cost-based rates, and establishing an interruptible tariff. CE further recommends ordering GFG to functionally separate its storage from its marketing affiliate, and establishing standards that determine the level of competition in Great Falls.

MPTM Testimony

29. Intervenor MPTM presented testimony through witness Karen Schellin. In testimony, MPTM also criticizes the contract between GFG and EWR. MPTM points out that 124 of the 125 GFG customers moving to choice chose EWR, GFG’s affiliate, as their supplier. MPTM suggests that the contract gives EWR a competitive advantage. MPTM testifies that there is no evidence that gas injected and withdrawn from storage on behalf of EWR and GFG has been accounted for separately. MPTM asserts that the transfer of gas purchase, pipeline

capacity, and storage capacity contracts to EWR creates stranded benefits to EWR and asserts that EWR may gain useful information regarding the GFG system not available to competitors. MPTM testifies that the proposed code of conduct does not comply with PSC rules.

30. MPTM argues that GFG's only basis for contracting with EWR is that GFG felt more comfortable in doing so. GFG did not obtain bids for the contract. Timing of the contract was in GFG's control and there were no apparent circumstances requiring the contract be entered prior to PSC approval of GFG's proposed restructuring. MPTM argues that the result is discrimination and preferential treatment of an affiliate over other suppliers, exactly what the Act is intended to prevent. MPTM also argues that aside from the inappropriate contracting, the contract itself has problems, which could have been addressed before the fact, if GFG had not proceeded to restructure prior to PSC approval.

31. MPTM argues that it was not necessary for GFG to assign the supply contracts, GFG should not have assigned the storage contract, and EWR should not be providing gas purchasing for GFG. MPTM argues that the assignment of storage to EWR gives EWR an unfair competitive advantage. MPTM argues that storage is not a supply component, and has not been deregulated as production and gathering have. It claims that GFG's assignment of storage effectively makes storage an unregulated service. MPTM argues that releasing the storage contract to EWR puts GFG’s customers at risk if they have to compete with others on the MPC system for storage.

32. MPTM does not recommend releasing the transmission and storage capacity to MPC (GFG contracts for the services from MPC), noting that this would put the customer at risk due to competition with other customers and suppliers competing for MPC's services. MPTM suggests that the capacity should be earmarked for GFG customers.

33. MPTM argues that GFG has not unbundled transmission, distribution, and storage as contemplated by the act. MPTM suggests that the PSC require GFG to unbundle its transmission and distribution services and release upstream storage and transmission capacity to departing customers. MPTM claims that this will ensure that customers have access to those services at regulated rates and provide a proper framework for a competitive market.

34. MPTM argues that GFG gains leverage through tying transmission and distribution, which will result in other customers paying higher transmission rates. MPTM

asserts that bundling transmission and distribution violates the Act’s requirement for unbundling of transmission, distribution, and storage, denies customer access to MPC's transmission system, and limits customers from taking only customer selected services from GFG.

35. MPTM argues GFG's proposed DT less pipeline transportation tariff (DT-LPT) tariff does not solve the problem because GFG holds the upstream capacity, raising the question of whether upstream capacity is available to customers choosing the DT-LPT. MPTM argues there is no need for customers to take that risk. In addition, MPTM claims GFG's DT-LPT is onerous because it imposes a cost of installing demand meters.

36. MPTM recommends GFG be required to release upstream MPC transportation capacity proportionately to its noncore customers, retain administration of its gas purchases, file tariffs that include only distribution costs, modify the general terms and conditions to reflect the PSC standards of conduct, and provide mechanisms that ensure that all suppliers have fair access to its customer base. MPTM recommends that GFG be required to release a proportionate share of its upstream storage and transmission capacity to customers who elect direct access on its system and, otherwise, that the PSC not allow GFG to collect the cost of upstream capacity in its trackers.

MCC Testimony

37. MCC's testimony focuses on matters which have been deferred to GFG's gas cost tracker procedure, pending before the PSC as PSC Docket No. D98.9.213.

GFG Rebuttal Testimony

38. In its rebuttal testimony, GFG addresses many of the concerns brought up in intervenor testimony and in some cases makes modifications to the GFG restructuring proposal to mitigate those concerns. GFG disputes claims by CE and MPTM that EWR has an unfair competitive advantage. GFG emphasizes that most customers eligible for choice have elected to stay with GFG as full service customers. GFG notes that both MPTM and CE are advocating their own best model for choice. GFG insists that MPTM's and CE’s failure to successfully compete in GFG service area does not prove that EWR has an unfair advantage. GFG states that it would like to see more competition and viable suppliers on their system.

39. GFG’s rebuttal also presents changes to the general terms and conditions, an addendum to the GFG / EWR contract, and changes to the distribution tariffs in response to

intervenor concerns. GFG's general terms and conditions modifications are intended to reflect PSC rules, clarify that nonaffiliated suppliers must receive transportation related information simultaneously with the utility's marketing affiliate, and change the prohibition on outbound telemarketing to apply only to residential customers. The addendum to the GFG / EWR contract changes the contract quantity to account for system growth by using the most current 12 months normalized volumes as the basis for calculation. The addendum also modifies the contract to include the commodity and the non-commodity cost of storage in the storage inventory book costs, per current purchased gas cost tracker-filing methodology. In addition, a new article states that GFG will pay for only the storage which is identified by GFG as needed for the cycle billing and balancing needs. In answer to other criticisms raised by the intervenors, GFG agrees to move the annual tracker filing to earlier in the year, which allows the firm price to be posted early enough for customers to compare competitive bids.

40. In response to intervenor requests, GFG also proposes a DT-LPT tariff, which permits customers to purchase transmission capacity directly from MPC, rather than on a bundled basis from GFG. Under the proposal, a demand meter will be installed at the customer's expense if the customer chooses a measured capacity assignment. With the rebuttal testimony GFG also presents an interruptible tariff that removes transmission capacity costs and passes through the MPC interruptible charges. GFG will enforce the interruptible tariff, if necessary, by shutting off customer meters.

41. In rebuttal, GFG also asserts that GFG's gas storage is reasonably accounted for and EWR is prevented from obtaining an unfair advantage as alleged by MPTM and CE. GFG asserts that the MPC storage contract and the associated nomination process prevent the asserted unfair advantage. GFG daily nominations must identify all suppliers to MPC. The gas managing entity (currently EWR) also provides a daily nomination that must match the nomination from GFG, and near the end of the month, nominated volumes are matched to volumes actually delivered. GFG testifies that the storage assigned to EWR serves only the Great Falls load.

DISCUSSION

Requirements of the Act

42. Gas utility restructuring is voluntary, but a gas utility choosing to restructure must do so in accordance with the Act and the PSC rules adopted pursuant to the Act. § 69-3-1403, MCA. The Act requires: functional separation of production and gathering from transmission, storage, and distribution, § 69-3-1404(1)(a), MCA; removal of production and gathering from rate base, § 69-3-1404(1)(a), MCA; compliance with PSC-approved standards of conduct, § 69-3-1404(1)(b), MCA; adequate provision for emergency supply and related services necessary to maintain operational integrity of the system, § 69-3-1404(1)(c), MCA; and compliance with PSC-approved standards protecting consumers and suppliers from anti-competitive and abusive practices, § 69-3-1404(2), MCA. The Act allows recovery of transition costs (commonly referred to as "stranded costs"), which are certain costs that become unrecoverable by the utility as a result of customer choice and open access. §§ 69-3-1403(2), MCA (cost recovery), and 69-3-1402(9), MCA (definition). The Act provides that "open access" exists when a utility has made its transmission facilities, storage facilities, or distribution facilities available to suppliers and service providers on a nondiscriminatory and comparable basis. § 69-3-1402(6), MCA.

43. The PSC has adopted rules governing gas utility restructuring. ARM 38.5.7001 through 38.5.7021. ARM 38.5.7005 establishes PSC-approved standards of conduct. ARM 38.5.7020 and 38.5.7021 pertain to universal system benefits programs (GFG has included a revised USBP with its restructuring application). The remaining PSC restructuring rules do not directly apply to the restructuring process itself. The remaining rules primarily pertain to licensing of natural gas suppliers.

Functional Separation

44. A utility proposing to restructure must functionally separate its natural gas production and gathering from its natural gas transmission, storage, and distribution services. § 69-3-1404(1)(a), MCA. GFG does not own production or gathering. GFG has customarily met the supply component of its natural gas services by acquiring gas through gas purchase contracts. GFG also does not own transmission facilities or storage facilities. GFG has contracted with others (e.g., MPC) for these components as well.

45. Not yet considering applicable standards of conduct as might relate to functional separation (discussed later), the PSC determines that GFG's restructuring, as proposed, does not create a functional separation problem. The statutory requirement for functional separation pertains to a utility's production and gathering in relation to the utility's transmission, storage, and distribution. § 69-3-1404(1)(a), MCA. GFG's only rough equivalent or substitute for production and gathering is the GFG gas purchase contracts. GFG's restructuring proposal functionally separates the way in which GFG acquires and provides the supply component (i.e., gas purchase contracts) by assignment of GFG gas purchase contracts to EWR.

Removal of Production and Gathering from Rate Base

46. As indicated, GFG does not own production or gathering. The Act's requirement that production and gathering be removed from rate base, § 69-3-1404(1)(a), MCA, is not applicable.

Standards of Conduct

47. The Act requires compliance with PSC-approved standards of conduct, § 69-3-1404(1)(b), MCA. GFG's proposed standards of conduct, as amended through GFG rebuttal testimony, appear to be an attempt to comply with the PSC-approved standards at ARM 38.5.7005. However, not all standards listed in the PSC rule appear in GFG's proposal and several of the PSC rule provisions are substantially rephrased by GFG. At the same time it appears that GFG has also included some provisions that might exceed some of the protections required by the PSC rule.

48. The PSC standards of conduct at ARM 38.5.7005 are mandatory minimum standards applicable in utility restructuring, unless, pursuant to ARM 38.5.7005(2), the restructuring utility specifically requests and demonstrates good cause that circumstances unique to the utility's situation justify a waiver. The PSC determines that GFG's proposed standards of conduct will be in substantial compliance with the PSC rule if the following modifications are made. First, in the definition section of GFG's proposed standards (§ 18.2 of proposed terms and conditions) GFG must clarify that the word "transportation," as used in GFG's proposed standards, includes distribution. Second, in the standards of conduct section of GFG's proposed standards (§ 18.3 of proposed terms and conditions), following "GFG shall conduct its

transportation business to conform to the following standards" GFG must insert, "(PSC rule ARM 38.5.7005 also applies and will govern to the extent application of any of the following standards may be in conflict with it)." With the modifications, GFG's proposed standards of conduct are approved.

49. MPTM and CE argue GFG had not adopted standards of conduct meeting the substantive requirements of the Act prior to GFG's entering the GFG / EWR contract and promoting implementation of GFG's DT tariff. MPTM argues the Act requires competitor nondiscriminatory and comparable access to GFG facilities and customers and this requires compliance with standards of conduct. If there is an anti-competitive nature regarding GFG's prefiling activities (i.e., the GFG / EWR contract and GFG's implementation of the DT tariff) compliance with established standards of conduct is not one of the problems. The Act itself does not include specific standards of conduct and the PSC had only proposed, but not yet enacted, specific standards of conduct at the time of the prefiling activities. The PSC cannot conclude that GFG's prefiling activities are in violation of specific standards of conduct, which simply did not exist at the relevant times.

Emergency Supply and System Integrity

50. A restructuring utility must provide for emergency supply and related services necessary to maintain operational integrity of its system. § 69-3-1404(1)(c), MCA. Pursuant to the GFG / EWR contract, EWR will provide GFG's gas supply for all supplier of last resort services. EWR will also provide balancing services for GFG, which also pertains to system integrity. GFG's (or the GFG / EWR contract) referenced supplier of last resort services encompasses emergency supply, including in the event a consumer's competitive choice supply fails. The provision, combined with the balancing provision and other provisions within GFG's proposal, also meets the system integrity requirements. GFG's proposal adequately addresses the emergency supply and system integrity requirements of the Act.

Customer Bill of Rights

51. The only contested issue pertaining to GFG's proposed customer bill of rights relates to telemarketing. CE objected to GFG's proposal as it pertained to a prohibition on telemarketing to customers. In response to CE's concern, GFG modified the prohibition to apply

only to residential customers. There were no other objections raised concerning customer protection aspects of GFG's proposal.

52. The PSC has two concerns relating to the prohibition on telemarketing. First, the prohibition appears anti-competitive and particularly so in regard to GFG's service area. GFG and its marketing affiliate, EWR, will have inherent advantages in regard to GFG service area customers, if for no other reason, because the service area is confined to a community to which GFG is a part and, from all appearances, GFG has community loyalty. Competitors might have a difficult time attracting customers and the prohibition on telemarketing will not help that situation. Second, an outright prohibition on telemarketing raises freedom of speech (i.e., commercial speech) concerns. Telemarketing may be an efficient means of providing GFG service area consumers with valuable consumer information about competition and competitors. So long as telemarketing communications concern a lawful activity and are accurate, a prohibition against them may violate commercial speech protections. A substantial state interest is required before a prohibition can be approved. No substantial state interest has been established for restricting speech in the manner proposed by GFG. The PSC determines that the prohibition on telemarketing cannot be approved.

53. Like GFG and the intervenors, the PSC is interested in addressing concerns of customers who do not want to be contacted by telemarketers. Therefore, no later than the time of GFG's compliance filing resulting from this order, GFG shall file a proposal with the PSC which provides a mechanism in GFG's customer bill of rights for a customer to request that suppliers on GFG's system not contact the customer and for suppliers to be made aware of such customer requests.

<u>Transition Costs</u>

54. The Act allows a restructuring utility to recover transition costs, certain costs that become unrecoverable as a result of customer choice and open access. §§ 69-3-1402(9), MCA (definition), and 69-3-1403(2), MCA (cost recovery). Transition costs may be associated with removal of production and gathering from rate base, but are not limited to that. GFG does not request recovery of transition costs. GFG's gas purchase contracts, the only element of GFG's proposed restructuring that arguably might contribute to transition costs, have simply been assigned to GFG's marketing affiliate, EWR. Apparently, EWR has taken assignment of these

contracts conditionally upon the five-year contract to supply GFG's traditional service customers. Any revision of that contract resulting from this PSC order may require that the transition cost issue be revisited.

Revenue Requirements

55. GFG's proposal for open access and customer choice is revenue neutral and no revenue requirement issues have arisen in this matter. Discussion of issues related to GFG's contracted gas price with EWR will be addressed in GFG's gas tracker filing (D98.9.213).

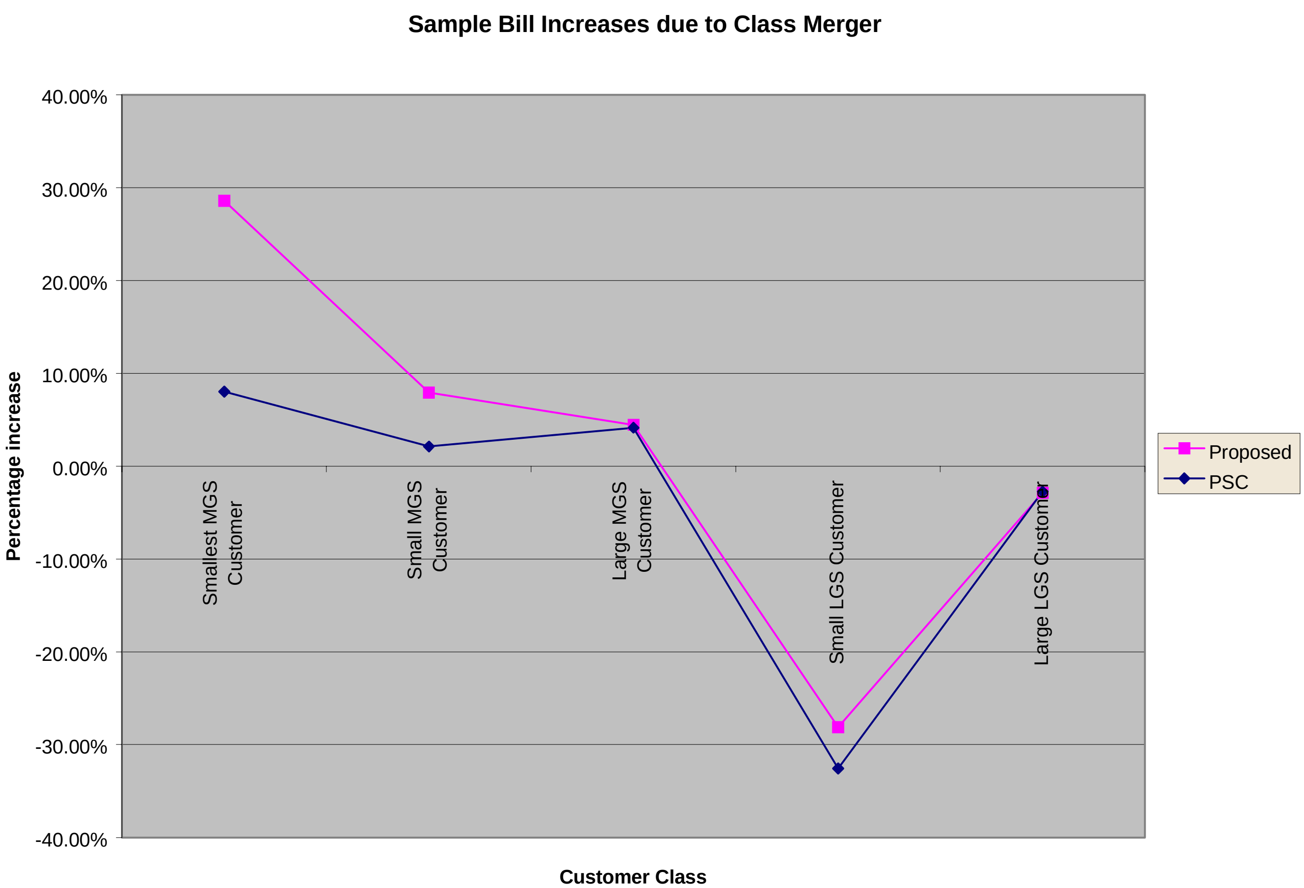
Rate Design

56. The PSC agrees with GFG and MCC that proposed stipulated rate design simplifies the rate structure through the elimination of seasonality, the reduction of cost differentials between variable rate blocks, and the merging of the MGS and LGS classes. The rate design also ensures a stable revenue recovery through increased customer charges. However, the PSC is concerned that the combining of the MGS and LGS classes may have significant impacts on the smallest MGS class customer. GFG explains that combining the two classes will result in an average monthly rate increase of $18 or 5.8 percent for MGS customers and an average monthly rate decrease of $86 or 6.5 percent for LGS customers. Although these average increases appear minimal, the PSC is concerned with the rate impact for the smallest users in the current medium general service class. Bill comparisons show that the rate increase to medium service customers may be as high as 28.58 percent annualized, or an additional $165 per year for the smallest users.[1]

57. The PSC finds that the rate impact on the medium service customers is not acceptable. The PSC prefers an alternative rate design for the merged LGS class, which caps the customer service charge at $35 (as opposed to the $45 rate proposed in the stipulation), sets the rate block at 50 mcf, and increases to the variable rates to $.37265 for volumes 50 mcf or lower and at $.36265 for volumes above 50 mcf. This change reduces the maximum annual rate increase on the smallest user from 28.58 percent to 8.03 percent, or from approximately a $14 monthly increase to approximately a $4 monthly increase. With the above change, the PSC

[1] Sensitivity analysis provided by GFG, received December 4, 1998.

determines that the rate design stipulation meets stated goals of the parties and is in the interest of GFG consumers.



Gas Costs and Gas Cost Tracking

58. In its application GFG does not request a change to gas costs. Gas costs became an issue in the proceeding because they are a product of, or affected by, the GFG / EWR contract, which is an issue in the proceeding. GFG and the intervenors have agreed that gas costs issues may be deferred to GFG's gas cost tracker (now pending as PSC Docket No. D98.9.213).

Negotiated Contract Services

59. GFG currently has a negotiated contract service (NCS) tariff. The tariff allows GFG to establish negotiated rates for certain qualifying customers who have bypass capabilities (e.g., alternative fuel source). MPTM argues that GFG's NCS tariff should be eliminated because it is unnecessary in restructuring and the competitive setting and it unfairly bundles transportation and distribution.

60. The PSC determines that the NCS provision has a place in restructuring and the competitive setting. To date GFG retains a substantial number of traditional bundled service customers in customer classes that qualify for NCS tariff application. In the future, even with restructuring, that could remain the case. So long as there are traditional bundled service customers, the NCS tariff has a legitimate purpose to avoid bypass and resulting diminished throughput in GFG's system. MPTM's suggestion that GFG should replace the NCS with a discount mechanism that requires PSC approval (a mechanism used on MPC's system) may have some merit, but it is not compelling.

61. MPTM further argues that GFG's NCS unfairly bundles transmission and distribution service. MPMT argues that transmission and distribution rates should be unbundled. Under the circumstances, including because GFG does not own transmission facilities and because GFG has now included its DT-LPT tariff, the PSC determines that the Act does not require transmission and distribution service or rates to be unbundled on GFG's system.

Demand Meters

62. In order for customers to elect a tariff that includes only distribution costs and not transmission costs, as is the case with GFG's proposed DT-LPT tariff, it is necessary to measure the customer’s demand. Demand can be measured through demand meters or through load profiling; however, the MPC transmission tariff requires that demand meters be used. MPTM points out that the DT-LPT tariff requires customers to install demand meters at their own cost, thus adding a potentially prohibitive cost to the customer. Both MPTM and CE claim that this extra cost amounts to a barrier to entry on suppliers competing with the utilities traditional service tariff.

63. The PSC disagrees with MPTM and CE. Every service has specific costs associated with its provision, and when prices are cost-based the difference in the costs of the

different services is the basis for economic choices. Charging customers to install demand meters is not a barrier to entry. The customer is responsible for costs it incurs. In addition, MPC currently installs demand meters for customers who contract with them for transportation services; thus, customers choosing the DT-LPT tariff would not incur these additional costs.

Evaluating Competition

64. CE recommends the PSC set standards to evaluate competition in the GFG service area. GFG argues that any standards should be developed for all restructured utility service areas, not just GFG's. The PSC determines that it will make every effort to remain informed of that status of competition on GFG's system as well as other utility systems in the state. However, formally monitoring competition and establishing formal standards to evaluate competition is not something the Act specifically authorizes or directs the PSC to do in regard to natural gas utility restructuring. To the extent the PSC might have inherent powers to do so, it would be premature to consider or set any standards for the GFG service area, as the matter has not been fully developed in this docket. The question of monitoring competition and establishing standards to evaluate competition was explored to some extent by the PSC through proposed rules pertaining to implementation of the Act (PSC Docket No. L-97.1-RUL). All proposed rules pertaining to evaluation of competition were challenged and the PSC determined that rules would not be adopted at that time.

Name Change

65. After filing its restructuring proposal, GFG notified the PSC that GFG's name has been changed to Energy West. This new name generates concern. CE has asserted that it perceives that many GFG service area customers think GFG and EWR are the same company. GFG's new name will compound this type of confusion. In order for competition to emerge, customers need to understand that there is a difference between GFG and EWR. GFG's proposed new name, Energy West, is commonly used as shorthand for GFG's marketing affiliate, Energy West Resources. The name "Energy West" does not adequately convey the separation of GFG from EWR. The PSC suggests that GFG apply another name that will not present the problems.

Customer Education

66. In order to ensure a fair transition to full choice, it is important that customers be fully informed of their choices, especially leading up to the eventual customer balloting process outlined by GFG. CE claims that GFG has not informed its customers having choice at this time of the options available to them. Specifically, CE asserts that GFG did not have a complete list of gas suppliers available for customers who asked about possible choice options. GFG contends that it maintains a list for customers who ask and the customer choice ballot, part of the customer education plan proposed by GFG, will include the names of all suppliers who wish to offer commodity service on the GFG system. GFG claims this will inform all customers of their supplier options.

67. The PSC determines that GFG must submit documentation (e.g., ballot, supplier lists, and education materials) GFG intends to provide to the public as educational material to the PSC, MCC and all PSC-licensed gas suppliers. Within 10 days of receiving such information, the interested persons should report in writing to the PSC and GFG any problem with the literature provided in order for the problem to be resolved before distribution. Interested persons may also advise the PSC if there is any indication consumers are not being sufficiently educated regarding this restructuring or supplier choices.

Assignment of Non-choosing Customers

68. GFG proposes that customers who have not made a choice by the end of three years of open access and customer choice will be assigned to suppliers by market share.[2] GFG suggests that this is an incentive for competitors to obtain market share early on. Under GFG's proposal, customers will be assigned to suppliers according to overall market share, not market share by class of customer being served. MCC recommends that the PSC require GFG to default non-choosing customers to traditional service, suggesting customers not making choice likely prefer traditional service.

69. The PSC determines that the method of assignment of customers can be and should be decided at a later time. The PSC agrees that assignment by market share per class of

[2] The proposal anticipates open access for all customers in the fall of 1999. Suppliers would then be assigned suppliers in the fall of 2001. The EWR/GFG contract is set to expire five years from November 1997, or November 2001.

customer is an incentive for competing suppliers to obtain market share. The PSC tentatively determines that assignment of nonchoosing customers by market share by class of customers will be the method approved. However, barriers to competition may exist now or in the immediate future and these may need to be addressed through the assignment process. It would be premature to determine the method of assignment at this time. It might also be reasonable to expect that some customers not choosing simply prefer traditional bundled services from GFG.

70. The PSC determines that, no later than twelve months prior to the end of the third year of open access and customer choice on GFG's system, GFG must file an application for approval of a method of assignment of customers who have not yet chosen a supplier. Assignment of customers by market share per class of customer will be the preferred method of assignment. If good cause is then shown that such method of assignment is not in the best interests of the public the PSC may order that another acceptable method be applied. In addition, the PSC is considering assignment of customers in other cases pending before the PSC and it is possible that a generic ruling or rulemaking will eventually occur on the issue.

Rule 18

71. Rule 18, as proposed by GFG, is problematic. It reads:

> The company may, at its option, provide materials and services to customers who request such materials and services. The costs of the materials and services shall be priced at the company’s costs, plus a reasonable allowance for overhead expenses, such as carrying cost of inventory, management, administrative and general expense.

72. To the extent the rule pertains to any regulated utility service, the rule is discriminatory as it allows GFG the option of providing the customer-requested materials and service. In other regards the rule is broad and vague, and could be interpreted to include a wide variety of materials and services, including virtually all requested by customers. Many such customer-requested services will likely not be regulated utility services. There are problems in attempting to tariff services that are not regulated. The PSC determines that GFG's proposed Rule 18 should not be approved as filed. If GFG can be more specific as to the identity of the services intended and either demonstrate that the services should be regulated utility services or provide an explanation as to why the services should otherwise be tariffed, GFG can present the matter to the PSC through a future application.

Universal System Benefits Program

73. In its application, GFG proposes modifications to its universal system benefits program (USBP). A USBP is a public purpose program for cost-effective local energy conservation, low-income weatherization, and low-income energy bill assistance. § 69-3-1402(13), MCA. A universal system benefits charge (USBC) is a non-by-passable rate or charge imposed on a customer to pay the customer's share of USBP costs. § 69-3-1402(12), MCA.

74. GFG's proposed USBP is to be funded at 1.72 percent of annual normalized revenues on qualifying USBPs, 0.64 percent of which will be spent on low-income specific programs, including a furnace efficiency program, a low-income rate discount program, and Energy Share of Montana program. The proposed amount is an increase to GFG's existing USBP funding level. GFG's proposed USBP funding exceeds the minimum levels required in the Act and in USBP rules adopted by the PSC.

75. The PSC determines that GFG's proposed USBP should be approved. In light of GFG's proposed USBP and USBC the PSC has considered possible application of CI-75 (voter-approved 1998 Constitutional Initiative, amending Art. VIII, sec. 17, Montana Constitution, to allow for people's right to vote on taxes). To qualify as a "tax" under CI-75 the revenue generated must accrue to government (Art. VIII, sec. 17(2)(c)). GFG's USBP and USBC revenue does not accrue to government.

Implementation Schedule

76. Certain implementation dates proposed by GFG in GFG's initial filing have already passed. The PSC determines that rate design changes resulting from this Final Order will be effective February 1, 1999. GFG's proposed date for implementing full choice for GFG's small general service customers and residential customers (i.e., October 1, 1999) will remain in effect, with the open season beginning May 1, 1999.

GFG's Prefiling Activities and the EWR Advantage

Anti-competitive Activities

77. Prior to GFG's March 24, 1998, filing with the PSC for approval of restructuring, GFG engaged in certain activities which have generated much of the controversy regarding

GFG's proposed restructuring. MPTM and CE have objected to the EWR / GFG contract and the GFG and EWR conversion of customers to GFG's DT tariff with EWR as the designated supplier.

78. The GFG / EWR contract became effective November 1, 1997, which is about six months following the effective date of the Act, about six months prior to the effective date of PSC rules implementing the Act, about four months prior to GFG's filing before the PSC, and about two weeks after EWR had filed to become a PSC-licensed natural gas supplier (on an interim basis, license effective November 14, 1998.)

79. In addition, all of the 125 GFG customers who qualified for service under GFG's DT tariff and who chose service under that tariff have been moved to choice with EWR as their supplier. No other supplier has contracted to supply gas for customers under GFG's current DT tariff. Both CE and MPTM point to this as evidence that EWR has an unfair advantage in the Great Falls market. GFG claims that the problem is due to a lack of marketing effort on behalf of MPTM and CE. However, GFG also states that ninety percent of the volumes associated with those who did opt for choice were vigorously competed for by CE and MPTM. Unless there is a huge disparity among customer volumes, these two GFG statements cannot both be true. GFG also asserts that competition exists when competitors have the ability to bid on contracts, regardless of the outcome of those bids. Only in a narrow context is GFG's assertion true. The market penetration of EWR for current choice customers indicates that EWR has a competitive advantage over its competitors. EWR has captured all of the current choice customers.

80. MPTM argues that the PSC should reject GFG's application. CE and MPTM argue that PSC approval of restructuring is required prior to open access and choice and, because of the GFG and EWR prefiling activities, the Act has been violated. CE argues that application of PSC-approved standards of conduct are essential prior to choice. CE argues that PSC approval of GFG's proposal prior to implementing choice would have prevented the anti-competitive and discriminatory practices GFG committed in implementing restructuring prior to PSC approval. CE argues that the GFG and EWR activities prior to approval captured the entire competitive market on GFG's system and constitutes the main barrier to competition in GFG's service area at this time.

81. MPTM and CE argue that GFG's prefiling activities were in preparation for restructuring and created a favorable position for GFG and its marketing affiliate (i.e., EWR) in the restructured environment. MPTM and CE argue that GFG has violated the Act by effectively "restructuring" without PSC approval and proper application of the safeguards of the Act and the PSC rules implementing the Act. MPTM argues that one goal of the Act is to provide open and nondiscriminatory supplier access to the system and the customers and restructuring must be done in a way that does not extend a preference to the restructuring utility's marketing affiliate. MPTM points to PSC rule ARM 38.5.7005(1)(d), which requires a restructured utility to prevent discrimination in favor of its own supply, services, divisions, and affiliates. MPTM also argues that GFG had no code of conduct prior to the GFG / EWR contract or moving GFG customers to GFG's distribution transportation tariff.

82. MPTM also argues that although the price GFG obtained may be good for GFG customers, the PSC should also address the effect GFG's prefiling actions have had on competition. CE argues that, as a penalty for the benefits resulting from GFG's prefiling activities, EWR should be prevented from serving in the GFG service area until some level of competition has be determined, such as when at least 20 percent of the commercial accounts have chosen an alternative supplier. MPTM argues that PSC approval prior to restructuring accomplishes important purposes, including a determination on compliance with law, allowance for interested parties to intervene and participate, identify problems and prevent harm from occurring. MPTM argues that some of the harm caused by GFG's prefiling restructuring activities cannot now be cured and a penalty of some magnitude, considering GFG has been in violation for about one year, is justified under § 69-3-206, MCA.

83. In reply, GFG argues that the CE and MPTM arguments mischaracterize and misstate the law. GFG argues that CE has misstated facts at numerous points and has abused the briefing process by taking positions for the first time in briefing. GFG argues that the Act cannot be construed as applying to GFG's prefiling activities. GFG argues that its prefiling activities did not provide open access to GFG customers under the Act. GFG argues that it, as a public utility, like other Montana gas utilities (e.g., Montana Power Co.), has offered transportation services to certain customers for years prior to the Act. GFG argues that its prefiling activities are consistent with its PSC approved DT tariff and its prefiling activities were not subject to any

code of conduct as GFG had not, and still has not, restructured. GFG argues that the Act cannot be construed as applying to GFG prefiling activities, including the GFG / EWR contract and EWR supply contracts with GFG customers. GFG argues its contract with EWR is simply outsourcing - an option that GFG has always had as a public utility.

84. Both GFG and the intervenors (i.e., CE and MPTM) are correct in many ways. The essential point regarding the intervenors' position is that there no reasonable doubt that GFG developed a substantial contract arrangement with its affiliate EWR prior to filing for restructuring and prompted customers qualifying for choice to move to choice prior to GFG's filing for restructuring. The timing of these activities is poor judgment on GFG's part, at best, as the activities clearly appear to be deliberate moves to seal advantages inherent in GFG as the incumbent utility and EWR, its marketing affiliate, in the move towards competition.

85. The essential point regarding GFG's position is that the prefiling activities are not illegal. GFG is correct that a gas utility may engage in certain activities in accordance with tariffs or implement management decisions such as outsourcing. The problem is that the activities are unavoidably accompanied by a conclusion that GFG did these things in anticipation of restructuring. The problem is in the timing. GFG acted with no other apparent intent than to place EWR in as good a position as possible for the competitive environment, including capturing as many customers as possible for the GFG and EWR affiliation. The GFG and EWR activities have anti-competitive results. No other competitor has successfully bid to provide supply within the GFG service area.

Remedies for Anti-competitive Activities

86. Denial of an application is a possibility in any application for restructuring. Denial of GFG's application would not be difficult to defend. Anti-competitive results are clear. However, nothing of record compels that particular outcome and the PSC is not persuaded that denial of GFG’s application is a preferable resolution, if it can be avoided. GFG's filing is voluntary. GFG is not required to restructure. The law does not prohibit GFG from withdrawing its application or rejecting modifications suggested by intervenors or the PSC. The PSC determines that action must be taken to correct the anti-competitive nature and results of the GFG and EWR prefiling activities, confined to those corrections that do not foreclose

restructuring altogether. Nevertheless, GFG's restructuring cannot be approved without the modifications suggested.

87. If GFG chooses to withdraw, unless and until GFG applies and obtains PSC approval of restructuring in accordance with the Act in regard to GFG's existing "open access and customer choice" tariffs (e.g., GFG's DT tariff), GFG will no longer be considered as open access and customer choice in regard to such tariffs under the Act. This will affect GFG's marketing affiliate, EWR, in that reciprocity provisions of the Act will preclude EWR's legal ability to compete outside of the GFG service area. Although to date the PSC has informally treated tariffs such as GFG's DT tariff as at least closely resembling open access and customer choice for natural gas licensing and reciprocity purposes pending implementation of PSC rules pertaining to restructuring and allowing a reasonable time for utilities to apply for restructuring, without the utility meeting the requirements of the Act, GFG tariffs such as GFG's DT tariff can no longer properly be considered as such.

88. To correct the anti-competitive results of the GFG and EWR prefiling activities the PSC determines that the GFG should bid all services (e.g., supply, balancing, nomination, emergency supply) presently obtained by GFG through the GFG / EWR contract for GFG service beginning November 1, 1999. GFG should seriously consider splitting the contract so that one supplier is not responsible for all GFG's supply requirements, if the overall cost of gas remains reasonable. GFG is free to request bids (or proposals) from any source deemed qualified by GFG, including EWR, but must also include all other PSC-licensed natural gas suppliers having license authority to supply gas in the GFG service area. All supply and related requirements for GFG's maintenance of system integrity and supplier of last resort obligations may be contracted for, but should remain closely monitored and controlled by GFG through the contract. The GFG bid process must be completely fair and GFG's decision in awarding the bid must be based on valid criteria.

89. The storage aspect of the existing GFG / EWR contract presents a special concern regarding this remedy. In regard to storage, there are two issues at hand. First, there is the GFG gas volumes in storage that were assigned to EWR. Second, there is storage capacity for which GFG originally contracted with MPC, and assigned to EWR. MPTM and CE claim that the contract between EWR and GFG does not properly account for storage and may allow EWR to

use GFG’s storage for non-core customers without paying for the storage. This storage is the first type – gas volumes in storage. GFG asserts that the contract does not allow EWR to use GFG’s storage to EWR’s benefit. The PSC finds that it is important that this type of storage is properly accounted for in order to ensure that EWR does not use this storage to its advantage. Even though GFG claims that the new contract provisions preventing EWR from using storage inappropriately, there is no evidence that EWR was prevented from taking advantage prior to PSC review of this case. This issue will need to be closely scrutinized in the ongoing tracker (PSC docket No. D98.9.213).

90. The second type of storage at issue in this docket is storage capacity. MPTM claims that storage capacity is a finite commodity and, if EWR were to decide not to release its storage in proportion to its decreased needs to service GFG’s core customers, choice customers could be at risk of not having storage capacity available to meet their needs.

91. 92. The GFG/ EWR contract appears to allow EWR to retain the storage capacity assigned to it after GFG releases it. Even if GFG customers do not pay for the released storage, being able to maintain a storage contract may benefit EWR when bidding in the region and for the supply contract for GFG traditional service customers. MPTM and CE argue that GFG should be required to maintain control of its storage. MPTM and CE argue, in lieu of GFG retaining storage, that a *pro rata* share of storage should be assigned to GFG customers (i.e., storage capacity would follow the customer). CE argues that customers should be given the choice to assume a *pro rata* share of storage, to be managed by either the supplier or EWR.

93. GFG argues that there is no evidence that storage capacity is limited and that customers and competitors would be at risk. At the same time, there is no evidence that storage capacity is unlimited and customers and competitors will not be at risk. In order for customers to access choice, storage must be available. In order for competitors to compete, storage must be available. If EWR has control of the GFG's storage during the transition to customer choice and open access, competition may be disadvantaged.

94. The storage issue is very complicated, because it is so closely tied with the provisioning of supply and the ability of a supplier to competitively bid in the market. At the present time, EWR either holds what was formerly GFG's storage (again meaning storage capacity) or has released it or portions of it. As alluded to above, the record does not

demonstrate anything in regard to the availability of storage capacity (i.e., whether or not storage is readily available at reasonable prices). Therefore, in regard to the GFG bid process for GFG required services, EWR may still be advantaged by holding storage assigned by GFG at the time of the required bid process. Therefore, through some means, GFG is obligated to ensure that all bidders have access to storage on a basis comparable to EWR at the time of bidding. If EWR holds any storage capacity at the time it bids to provide services to GFG, if it bids, that storage will be imputed as being storage which was assigned to EWR through the GFG / EWR contract.

95. GFG's prefiling activities pertaining to notifying customers of the availability of GFG's DT tariff and EWR's ultimate collection of virtually all GFG-notified GFG customers who then selected DT service presents a problem not as readily suitable to PSC authority as is the GFG / EWR contract. Remedying the situation is complicated, legally and practically. Interrupting in-force contracts may be detrimental to all involved and to the move towards open access and customer choice. Customers who have signed open access contracts with EWR, only to have them voided or altered, may simply be inclined to return to traditional service if open access is perceived as risky.

96. Additionally, GFG is the entity the PSC has authority over in this case. To affect EWR directly a separate proceeding would be required. The present record, although possibly indicative, is not compelling in regard to actionable violations by either GFG or EWR or both in concert (but for the timing aspect discussed above). GFG's DT tariff is something EWR's competing suppliers could have used (as GFG did) as a means of promoting competition, but apparently did not. Given all circumstances, from a practical standpoint, intruding on established supply / customer agreements does not appear to be in the best of all interests involved. Any EWR advantage already gained will have to be corrected for through other means, such as through GFG's customer education requirements.

CONCLUSIONS OF LAW

97. All findings of fact and discussion which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this order are incorporated herein as conclusions of law.

98. The PSC has jurisdiction over GFG's application pursuant to Title 69, MCA, specifically through the Natural Gas Utility Restructuring and Customer Choice Act, §§ 69-3-1401 through 69-3-1409, MCA. GFG's application is proper in form and was properly noticed, protested, processed, and heard in accordance with the applicable provisions of Title 69, MCA, Title 2, Ch. 4, MCA (Montana Administrative Procedure Act), and ARM Title 38, Ch. 2 (PSC procedural rules).

ORDER

99. All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this order are incorporated herein as an order.

100. All pending objections, motions, and arguments not specifically having been ruled on in this Order (if any) shall be deemed denied, to the extent that such denial is consistent with this Order.

101. All GFG proposals included in GFG's application, as modified by GFG through proceedings on this matter, not specifically discussed above are approved to the extent that such approval is consistent with this Order.

102. The PSC, being fully apprised of all premises, HEREBY ORDERS that GFG's application to implement open access and customer choice is approved, subject to the modifications identified in the above discussion.

Done and dated this 23rd day of December, 1998, by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Presiding Commissioner

DANNY OBERG, Commissioner
(concurring opinion included)

BOB ROWE, Commissioner
(concurring opinion included)

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

CONCURRING OPINION OF COMMISSIONER OBERG

I support the provisions of this order as a reasonable and reasoned transition to fully opening the Great Falls Gas Company utility to customer choice. It fairly balances the interests of the utility, customers and potential competitors.

I would have been willing to go even further to promote competition, but believe jurisdictional problems and conflicting laws preclude the Commission from enacting many of the recommendations of the intervenors. Those explanations are contained within the order.

I differ from the ruling on one matter. FOF 69, dealing with customer assignment, is too modest of a finding and by deferring ruling on customer assignment I believe the Commission has removed a major incentive for potential competitors to seek customers in the residential marketplace where margins are thin.

I fully support Great Falls Gas. Company's proposal that would have assigned customers who failed to make a choice on the basis of market share. I believe it would have created a major incentive for competitors to market to residential customers earlier than they might otherwise.

Regulators have a responsibility to promote competition for small users accounts and I believe the Commission erred in not adopting the Great Falls Gas proposal immediately.

RESPECTFULLY SUBMITTED this 23rd day of December, 1998.

DANNY OBERG, Commissioner

CONCURRING OPINION OF COMMISSIONER ROWE

Great Falls Gas is to be commended for taking the step, notable for a small gas company, of voluntarily opening it's distribution system to customer choice of supply. In exchange, its supply affiliate will be able to market over the MPC distribution system.

In Paragraph 63 of its order the Commission declines to set specific standards for evaluating competition. I hope all parties would agree that to maximize customer benefit and minimize customer loss, the goal should be "workable competition." Workable competition is something less than the economic ideal of "perfect" competition, but something more than oligopoly.

The Commission’s order takes a number of significant actions to begin the difficult task of moving the provision of natural gas in Great Falls toward workable competition. As we work through this process, all parties and the Commission should have the outlines of workable competition in mind, so that we know it when we see it, and can respond accordingly.

The analysis generally includes the following steps:

1. **Defining the geographical market**. At this point the market definition would be limited to Great Falls, although the definition could eventually be expanded.

2. **Defining the product market.** The market clearly includes natural gas delivered over the networked distribution system. Eventually the definition might be expanded to include certain readily substitutable products.

3. **Identifying any submarkets which should perhaps be considered separately.** For example, experience in natural gas and other industries indicates residential and small business should perhaps be evaluated separately.

4. **Determining the total number of suppliers serving the market as identified.** A starting point may be found on the PSC’s web page listing licensed suppliers, although it’s important to know who is actively seeking to serve a particular market.

5. **<u>Determining market share of the top four-to-six firms, and applying a market-concentration index</u>.** Commonly used indices include Landes-Posner[3] or especially Herfindahl-Hirschman.[4]

6. **<u>Considering other more heuristic factors as may be appropriate</u>.**

7. **<u>Develop appropriate responses</u>.**

A good starting point is the FTC-DOJ Merger Guidelines,[5] which are the focus of much industrial organization, anti-trust, and regulatory economics. The Guidelines specifically apply the HHI, going on to consider non-quantifiable factors. (One of the breathtaking and disturbing aspects of the Commission's various restructuring cases is that most of the "competition experts" who have testified have been unfamiliar with the Guidelines, and in several cases had not even heard of them.)

Workable competition encourages static efficiency (doing the same thing better), dynamic efficiency (innovation), and drives price closer to the marginal cost of production. In some situations (buying a car or seeing a movie), everyone considers choice to be intrinsically desirable. This is true for some concerning utility service, but less so for those customers for whom utility service is a low-involvement product. (The desirability of choice is also offset for many customers by the various demand-side transaction costs and supply-side barriers.) Absent regulation, market concentration allows inefficiency and allows price to remain measurably higher than it would be with workable competition. If competition is more fully developed for one submarket (for example, large customers), opportunities exist to shift costs to those customers for whom competition is less developed.

Experience introducing competition, especially retail competition, to network industries demonstrates that competition advances slowly without aggressive public policy action or innovations that leapfrog existing technologies, and that a "tight" or oligopolistic market structure is often the result.[6] The natural gas commodity is potentially an exception where

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[3] 94 <u>Harvard Law Review</u> 937, March 1981.
[4] 54 <u>American Economic Review</u> 761, September 1964.
[5] USDOJ, Mimeo, June 14, 1982.
[6] See, William Shepherd, "Dim Prospects: Effective Competition in Telecommunications, Railroads and Electricity," <u>The Antitrust Bulletin</u> (Spring, 1997) 151). Shepherd calls for at least five reasonably comparable competitors, no firm with over forty percent of the market, and reasonably free entry into all market segments/

competition has the promise, but not the assurance, of developing for smaller customers. To reach this goal, we have to know what the goal is.

RESPECTFULLY SUBMITTED this 23rd day of December, 1998.

BOB ROWE, Commissioner